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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 453

WALTER M. BRIGGS, doing business as WALT'S AUTO PARKS AND GARAGES,

Appellant

vs.

THE CITY OF LOS ANGELES; THE BOARD OF POLICE COMMISSIONERS OF THE CITY OF LOS ANGELES STATE OF CALIFORNIA; MICHAEL KOHN, EMMETT MC GAUGHEY, JOHN FERRARO, WILLIAM C. LUCITT and HERBERT A. GREENWOOD, MEMBERS OF AND CONSTITUTING THE BOARD OF POLICE COMMISSIONERS OF THE CITY OF LOS ANGELES,

Appellee.

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vs.

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Appellee.

Appeals to the United States Supreme Court From Judgments of the District Court of Appeal, Second Appellate District, Division One, State of California.

JURISDICTIONAL STATEMENT.

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Appellee.

Appeals to the United States Supreme Court From Judgments of the District Court of Appeal, Second Appellate District, Division One, State of California.

JURISDICTIONAL STATEMENT.

Pursuant to Rule 15, Supreme Court rules, appellant sets forth herewith his jurisdictional statement as required by Paragraph 2 of Rule 13 Supreme Court Rule:—

A.

Opinion Below.

Briggs v. City of Los Angeles, 154 Cal. App. 2d 642, in first case, No. 2d Civil No. 21874. No opinion in 2d Civil No. 23204.

Jurisdiction is invoked under Title 28, Section 1254(2) and Section 2101, Title 28, Section 2104, Title 28. The appellant duly filed notice of appeal from the first judgment involving a review of the decision of the District Court of Appeal rendered October 23, 1957. Hearing denied by the Supreme Court December 17, 1957. Notice of appeal was duly filed on Mar. 14, 1958 with the Clerk of the District Court of Appeal, Second Appellate District, at Los Angeles, California. The Honorable Thomas P. White, Presiding Justice of the District Court of Appeal, Division One, extended the time within which to file and docket the record in this case to and including October 15, in order that Petitioner might exhaust any other remedies involving his constitutional rights.

Petitioner thereafter filed his Petition for a Writ of Prohibition and Writ of Mandate in the District Court of Appeal, Second Appellate District, Division One, this case being 2d Civil No. 23204. The District Court of Appeal, Division One, denied the Writ of Prohibition and the Writ of Mandate June 10, 1958. Petitioner then filed a Petition for a hearing in the Supreme Court of California, which court denied the hearing on August 6, 1958.

B.

Concise Statement of the Grounds on Which Jurisdiction Is Invoked.

(i)

Notice of Appeal.

Notice of Appeal to the Supreme Court of the United States was duly and regularly filed in the District Court of Appeal, Second Appellate District, on Oct. 14, 1958 and said Court and Presiding Justice White, made an order to consolidate the records on appeal of Case No. 28174 and 23204, as each involved the identical statute under attack. This consolidated record is being submitted to this Honorable Court herewith.

The proceedings challenge the constitutionality of subsection (k) of Section 26.03 of the Municipal Code of the City of Los Angeles relating to automobile parking lots and the licensing and regulation thereof and whether the said ordinance inherently, and as construed and applied violate due process of law and the equal protection of the laws, and rights, privileges and immunities of Citizens of the United States in violation of the Fourteenth Amendment to the Constitution of the United States and whether the Ordinance impairs the obligation of contract in violation of Article I, Section 10, Constitution of the United States.

(ii)

Judgments Sought to Be Reviewed.

The judgments sought to be reviewed were as follows:

Briggs v. City of Los Angeles entered October 23, 1957, in Second Appellate District, Division One, petition for hearing denied in Supreme Court, December 17, 1957, Notice of Appeal filed Mar. 14, 1958 to the United States Supreme Court. Time for preparing and docketing

record enlarged to October 15, 1958. Petition for hearing on application for Writ of Prohibition and Mandate, filed April 29, 1958, and denied June 10, 1958, by the District Court of Appeal, Second Appellate District, Division One. Petition for Hearing in the California Supreme Court denied August 6, 1958. Notice of Appeal to the Supreme Court of the United States duly filed on Oct. 14, 1958. in its District Court of Appeal, Second Appellate District, Division One.

(iii)

Statutory Provisions Believed to Confer Jurisdiction of the Appeal.

Title 28, Section 1254(2) and Section 2104;

United States Constitution, Art, I, Sec. 10;

United States Constitution, Fourteenth Amendment.

The following cases are believed to contain jurisdiction:

Stromberg v. California, 283 U. S. 359;
Buck v. Bell, 274 U. S. 200;
Hurtado v. California, 110 U. S. 535;
Walker v. Sauvinet, 92 U. S. 90;
Williams v. Standard Oil Company, 278 U. S. 235;
Tyson Bros. United Theatre Ticket Offices v. Banton, 273 U. S. 418;
Nebbia v. New York, 291 U. S. 502;
Hegeman Farms Corp. v. Baldwin, 293 U. S. 163.

C.

Questions Presented by This Appeal.

1. Whether Section 26.03; particularly Section 26.03-(k), inherently and as construed and applied in this case denies the petitioner due process of law guaranteed by the

Fourteenth Amendement to the Constitution of the United States.

2. Whether Section 26.03; particularly Section 26.03-(k), inherently and as construed and applied in this case denies the petitioner the equal protection of the laws guaranteed by the Fourteenth Amendement to the Constitution of the United States.

3. Whether Section 26.03; particularly Section 26.03-(k), impairs the obligation of contract guaranteed by Article I, Section 10, United States Constitution.

4. Whether Section 26.03; particularly Section 26.03-(k), is arbitrary and capricous and beyond the police power of the state.

5. Whether Petitioner was denied due process of law, guaranteed by the Fourteenth Amendment to the Constitution of the United States, when no court hearing on the issues created by the pleading was ordered by the Court and no other proceedings took place than that which occurred before the Police Commissioner.

6. Whether a parking lot is so affected with public interest as to require a license to operate and whether regulations may be adopted by a City preventing the parking lot operator from moving any vehicles off of a lot on to a street or onto a public alley and whether parking lot operators may be deprived of the use of public streets or public alleys.

7. Whether a license to operate a parking lot, if valid, may be arbitrarily suspended without a court hearing and the owner deprived of the use of his property.

8. Whether a leasee of a parking lot can be deprived of the use of his parking lot by the order of a police

commission because his attendant moved cars parked on his lot off and back again and used the public alley.

9. Whether The District Court of Appeal is in error in its statement that the parking lot business is affected with a Public Interest of the character that the state might regulate.

10. Whether The District Court of Appeal was in error in holding that the selection of only those persons who operate a parking lot where more than eight (8) motor vehicles are kept, parked or stored for a separately stated consideration and excepting therefrom all others, is a proper legislative classification and does not deny to the persons within the selected class equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

D.
The Facts.

Section 26.03(k) provides that,

> "neither the permittee, his agents or employees, shall drive, park, stand, stop or store any vehicle parked or stored in any such parking lot or, upon, or across any public street, public sidewalk, public alley or other public place, or drive or move any vehicle parked or stored in any automobile parking lot except within the property lines of such automobile parking lot."

Your Petitioner Walter M. Briggs, is a major parking lot operator in the City of Los Angeles. One of the lots that he has leased in his operations is located at 630 South Hill Street, Los Angeles.

On March 19, 1947, he was issued a permit by the Board of Police Commissioners to conduct the automobile

parking lot business. Included in the permit was the right to operate the lot back of Department Store, known as Bullock's Department Store, and located at 630 South Hill Street, Los Angeles. The rent paid for this lot is approximately $60,000 a year, in advance. Three men are employed regularly on this lot. Petitioner employs other men on other lots in Los Angeles and elsewhere.

As people bring their cars into the lot, it sometimes becomes necessary to move other cars so that the persons coming into the lot may be able to park adequately. Sometimes it becomes necessary for attendants to drive a car off of the lot into alleyway in back of the lot or onto the street. The Ordinance under attack forbids the petitioner, his agents or his employees to drive, park, stand, stop, or store any vehicles parked or stored in any such parking lot on, upon, or across any public street, public sidewalk, public alley or any other public place, or to drive or move any vehicle parked or stored in any parking lot except within the parking confines of said parking lot.

Any person other than the permittee or his employees may do any of the things forbidden to him. A person driving an automobile into the parking lot may himself move some other car out or move his own car in or out but not the permittee or his employees.

The permittee enters into a parking lot contract with the public and persons driving into his lot to store their cars safely and to move it when necessary for a fee. This safety necessarily includes movement of the car under all kinds of conditions including earthquake, fire, storms or any other reason. However, the Ordinance provides that under no conditions may the permittee or his employees move these vehicles except within the confines of the parking lots.

On August 3, 1955, the Board of Police Commissioners of the City of Los Angeles ordered the license of petitioner to operate his lot at 630 South Hill Street suspended for 7 days because, it is charged that his employees moved some vehicles on and off the lot at 630 South Hill Street in violation of this ordinance.

A Petition for review of decision of the Police Commission was filed in the Superior Coufrt. No evidence was taken by the Superior Court and no hearing was had by the Superior Court upon any of the pleadings. It only heard argument and denied the petition for review on May 17, 1956. Thereafter an appeal was taken from the decision of the Superior Court wherein Section 26.03(k) was attacked as unconstitutional, as beyond the Police power of the city; as an unreasonable classification; also that the ordinance unreasonably regulates the operation of such parking lots and impairs the right to contract and subdivision (k) denies the operator the right to drive on the highways.

The District Court of Appeal, Second Appellate District, Division One thereafter upheld the constitutionality of Section 26.03 of the Municipal Ordinance and particularly 26.03(k), and as constitutional and not in violation of the (state or) Federal Constitution (154 Cal. App. 2d 642) and denied the challenge to the ordinance as being arbitrary, capricious, denying equal protection of the laws, and impairing the obligation of contract.

A petition for hearing in the Supreme Court of the State of California was denied. Thereafter in order to exhaust all possible state remedies a petition for a Writ of Prohibition and a Writ of Mandate, attacking the constitutionality of Section 26.03(k) on the ground that it violates Article I, Section 10 of the United States Constitution and

the Fourteenth Amendment to the Constitution of the United States was duly filed and denied by the District Court of Appeal on June 10, 1958. In said petition your Petitioner specifically challenged the constitutionality of Section 26.03(k) of the Municipal Code of the City of Los Angeles, inherently and as construed and applied in this case as violative of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 10, to the Constitution of the United States and challeged the ordinance as abridging the freedom of contract.

Incorporated in your petition was also the action before the same court in denying the contention of Petitioner on the ground of the Police Commissioner was arbitrary and capricous and denies equal protection of the laws. The Supreme Court denied a hearing on August 6, 1958.

Presiding Justice, Thomas P. White, ordered the records, the case in 2d Civil No. 21874, *Briggs v. City of Los Angeles* and 23204 *Briggs v. City of Los Angeles*, consolidated for purposes of this appeal.

E.

Substantial Questions Involved.

The Federal questions involved are substantial as the case involves the rights of parking lot owners throughout the county, and other persons who may permit cars to be parked on their property. Every city in the county now has large parking lot operations. The flow of traffic in and out of parking lots throughout the day and throughout the county is very sizeable. May Police Commission require a license of such a parking lot operator which is the operation of a private business for profit. May it single out the parking lot operator and his employees for invidious

and special treatment, forbidding only them from using the public streets or alleys to move cars in or out of the lot. Is such action so arbitrary and capricous as to deny the equal protection of the laws and due process of law. (*Yick Wo v. Hopkins*, 118 U. S. 356.)

Williamson v. Lee Obstetrical Co. of Oklahoma, 348 U. S. 483, 99 L. Ed. 563.

Whether a parking lot is subject to public interest or whether it is subject to municipal regulation, whether the right to suspend a license for moving a car to a street and back again or to an alley and back again, whether the ordinance is so arbitrary and capricous and whether it has no substantial relationship to the object to be attained are questions of nation-wide importance which should be determined by this Honorable Court.

Petitioner prays that this Court note probable jurisdiction and grant a full hearing hereon.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Appellant.

APPENDIX.

Opinion of the District Court of Appeal, Second Appellate District, Division One.

(Civ. No. 21874. Second Dist., Div. One. Oct. 23, 1957.)

Walter M. Briggs, Appellant v. The City of Los Angeles *et al.*, Respondents.

Appeal from a judgment of the Superior Court of Los Angeles County. Arnold Praeger, Judge. Affirmed.

Proceeding in writ of review and in prohibition to review action of a municipal board of police commissioners suspending petitioner's police permit to conduct an automobile parking lot. Judgment denying relief, affirmed.

Gitelson, Coyle, Cooper & Savitch, Alfred Gitelson and Leon Savitch for Appellant.

Roger Arnebergh, City Attorney, Donald M. Redwine, Assistant City Attorney, and Eugene J. Didak, Deputy City Attorney, for Respondents.

DORAN, *J.*—This is a proceeding, brought by way of a petition for writ of review and writ of prohibition, to review the action of the board of police commissioners of the respondent city in suspending for one week petitioner's police permit to conduct an automobile parking lot at 630 South Hill Street in Los Angeles.

The trial court found against petitioner's contentions, basing its decision upon conclusions that the board had not proceeded without or in excess of jurisdiction; that petitioner had been accorded a fair hearing; that there was no abuse of discretion, and that Section 26.03 of the Los Angeles Municipal Code regulating parking lots where more than eight automobiles are parked, is constitutional.

On April 5, 1955, a complaint was filed with the board of police commissioners seeking to deny appellant's 1955 application for renewal of the parking lot permit, charging the appellant with having committed many violations of the municipal code. These violations related to the moving of vehicles on and off the lot for maneuvering purposes, and the parking of vehicles in St. Vincent Court, a dead-end street at the rear of the parking lot.

At the hearing there was testimony by police officers in respect to such violations. One officer testified to a conversation with one of appellant's attendants in which the latter gave as the reason for cars being moved off the lot and out into the street, "We are a little crowded for space." Appellant Briggs testified that the parking business in question involves a rental of $60,000 per year for parking lot with a 41-car capacity, and that the business was operating at a loss of $700 per month.

The hearing officer found that the witnesses were truthful; that there was "conclusive" evidence of 20 violations on one day and 35 violations on another day; and that appellant was familiar with the code sections involved. The board of police commissioners, after hearing oral arguments, suspended appellant's permit for the space of one week.

Section 26.03 of the Los Angeles Municipal Code, providing for the control and regulation of automobile parking lots, defines such a lot as any "single parcel of land under single management or control where more than eight motor vehicles are kept, stored or parked within or without a building, for a consideration, at any one time." Certain exemptions not here involved, are specified. It is provided that any permit issued for such a parking lot "may be suspended or revoked after due notice and op-

portunity for a hearing has been given . . . whenever the board shall find: (1) that the permittee has violated or caused, permitted or encouraged the violation of any provision of this section, or any rule or regulation of the Board adopted by virtue of this section." and for other specified reasons.

Section 26.03 (k) provides that "Neither the permittee, his agents or employees shall drive, park, stand, stop or store any vehicle parked or stored in any such parking lot on, upon or across any public street, public sidewalk, public alley or other public place, or drive or move any vehicle parked or stored in any automobile parking lot, except within the property lines of such automobile parking lot."

It is the appellant's contention that Section 26.03 (k) is unconstitutional in that: (1) the ordinance is beyond the police power of the city; (2) that there is an unreasonable classification between those who park more than eight automobiles at a time for a consideration, and those who park fewer automobiles and who do not charge a direct consideration or are members of the exempt classes; (3) that the ordinance unreasonably regulates the operation of such parking lots and impairs the right to contract; and (4) that subdivision (k) is in conflict with the general state law and denies to the operator the right to drive on the highways.

An examination of the ordinance in question and the various authorities dealing with regulatory measures and the constitutionality thereof, leads to the conclusion that the present ordinance is not subject to any of the objections raised; that it is a justifiable, police regulation of which appellant may not complain.

There can be no question but that a municipality has the power to regulate useful businesses which by their nature are affected with a public interest. (State Board of Dry Cleaners v. Thrift-D Lux Cleaners, 40 Cal. 2d 436 [254 P. 2d 29].) If such a regulation be not unreasonable, it must be upheld by the courts. And the rule is well established that all presumptions favor the validity of a statute, and likewise, of an ordinance.

As argued in the respondents' brief, the ordinance here under discussion appears to be a reasonable and valid exercise of the police power, "regulating the operation of commercial parking lots so as to confine their operations to private property. Nowhere does it deny the parking lot operator his privilege of driving on the highways . . .

"The ordinance here under attack is not a traffic regulation, It is a regulation of a commercial enterprise affected with a public interest."

Nor can it be properly said that the regulation is based upon an unreasonable classification because applying to parking lots "where more than eight motor vehicles are kept, stored or parked." The determination of a class based upon size, number of units, volume or capacity has frequently been upheld.

An example of such classification is found in Gillum v. Johnson, 7 Cal. 2d 744, 759 [62 P. 2d 1037, 63 P. 2d 810, 108 A. L. R. 595] where the reviewing court says: "It is well established that the matter of classification is primarily one for legislative determination and no argument has been advanced which would compel the conclusion that in its taxing features the classifications laid down are so arbitrary or unreasonable as to require judicial condemnation. This conclusion must especially apply to

classifications under the state act, namely, those engaged in employment where the industry or business engages eight or more employees. It was deemed necessary to draw the line somewhere in order that the plan be not too cumbersome or unwieldy."

The appellant's other contentions are equally untenable. The ordinance is not objectionable as impairing the right to contract. As said in 11 California Jurisprudence 2d 677, "The constitutional principle of inviolability of contracts is subject to the one great qualification that contractual rights like all other forms of property, are held subject to the exercise of police power."

Nor is the ordinance in conflict with any general state law. As stated in respondents' brief, "This is a case in which the City has established a comprehensive scheme to regulate a business which is unregulated by the state." As hereinbefore noted, the ordinance is not a traffic regulation, and its provisions are neither unreasonable nor discriminatory.

The record shows that the trial court properly viewed the record of the proceedings, before the board of police commissioners, and that its decision is based upon proper jurisdiction, fair trial and a proper exercise of discretion.

The judgment is affirmed.

WHITE, *P. J.*, and FOURT, *J.*, concurred.

A petition for a rehearing was denied November 18, 1957, and appellant's petition for hearing by the Supreme Court was denied December 17, 1957, Carter, J., was of the opinion that the petition should be granted.

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JAMES R. BROWNING, Clerk

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Appellee.

MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL.

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Appellee.

MOTION TO AFFIRM THE JUDGMENT AND/OR DISMISS THIS APPEAL.

Appellee, pursuant to the Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the judgment of the District Court of Appeal, Second Appellate District, Division One, State of California, rendered and entered on June 10, 1958, be affirmed and/or that the appeal taken therefrom to this court be dismissed on the ground that the Federal question is so unsubstantial as not to warrant further argument.

Statement.

This is an appeal from the judgment of the District Court of Appeal, Second Appellate District, Division One, State of California.

Appellant was charged in a complaint filed with the Board of Police Commissioners of the City of Los Angeles on April 5, 1955, with violating Section 26.03 of the Los Angeles Municipal Code.

A hearing was held before a hearing examiner of appellee Board on June 3, 1955, at which time said examiner took testimony and received evidence of both parties in connection with appellant's application for renewal of his public automobile parking lot permit.

The hearing examiner filed his report and recommendations with the Board. The Board thereafter considered the hearing examiner's report and petitioner's exceptions and held further hearings on June 29, 1955, August 3, 1955, and August 8, 1955.

Section 26.03 of the Los Angeles Municipal Code provides, among other things, that the Board may suspend or revoke a permit, after due notice and opportunity for a hearing, if the permittee has violated any of the provisions of Section 26.03.

The Board denied petitioner's exceptions, adopted the hearing examiner's report and recommendations and, on August 3, 1955, suspended petitioner's police permit for his public parking lot at 630 South Hill Street, Los Angeles, California, for the period commencing August 14, 1955, and ending at the close of business on August 20, 1955.

On August 8, 1955, the Board denied appellant's petition for reconsideration.

A. Petition for Review of the Decision of the Police Commission Was Filed in the Superior Court.

The proceeding was heard on November 28, 1955, and of December 19, 1955, in Department 34 of the Superior Court, and, following argument by respective counsel, was submitted on the record, which the court considered. The record showed by substantial evidence that the provisions of Section 26.03 of the Los Angeles Municipal Code were violated by petitioner on numerous occasions.

The record before the trial court included the Petition for Writ of Review and Writ of Prohibition, together with a copy of the complaint before the hearing examiner, a copy of Section 26.03 of the Los Angeles Municipal Code, Ordinance No. 89,677, as amended by Ordinance No. 102,926, a copy of the hearing examiner's report, a copy of the petitioner's exceptions to the hearing examiner's report, and a copy of the letter of notice to the petitioner of the Board's order of suspension, and the Answer to the Petition, together with the reporter's transcript of the proceedings before the Board, and the documentary evidence received by the examiner and considered by the Board.

The trial court only heard argument and denied the petition for review on May 17, 1956. Thereafter an appeal was taken from the decision of the Superior Court wherein Section 26.03(k) was attacked as unconstitutional, as beyond the police power of the city; as an unreasonable classification; also that the ordinance unreasonably regulates the operation of such parking lots and impairs the right to contract, and subdivision (k) denies the operator the right to drive on the highways.

The District Court of Appeal, Second Appellate District, Division One, thereafter upheld the constitutionality

of Section 26.03 of the Municipal Ordinance and particularly Section 26.03(k), and as constitutional and not in violation of the (state or) Federal Constitution (154 Cal. App. 2d 642), and denied the challenge to the ordinance as being arbitrary, capricious, denying equal protection of the laws, and impairing the obligation of contract.

A petition for hearing in the Supreme Court of the State of California was denied. Thereafter a petition for a Writ of Prohibition and a Writ of Mandate, attacking the constitutionality of Section 26.03(k) on the ground that it violates Article I, Section 10 of the United States Constitution and the Fourteenth Amendment to the Constitution of the United States, was duly filed and denied by the District Court of Appeal on June 10, 1958. Petitioner specifically challenged the constitutionality of Section 26.03(k) of the Municipal Code of the City of Los Angeles, inherently and as construed and applied in this case as violative of the Fourteenth Amendment to the Constitution of the United States, and Article I, Section 10, of the Constitution of the United States, and challenged the ordinance as abridging the freedom of contract.

Incorporated also was the action before the same court in denying the contention of petitioner that the action of the Board of Police Commissioners was arbitrary and capricious and denied equal protection of the laws. The Supreme Court denied a hearing on August 6, 1958.

Presiding Justice, Thomas P. White, ordered the records of the cases in 2d Civil No. 21874, *Briggs v. City of Los Angeles,* and No. 23204, *Briggs v. City of Los Angeles,* consolidated for the purposes of appeal.

Argument.

In this case no challenge was made to the Board's jurisdiction prior to its order of suspension. The issue was not raised at any time in the administrative proceeding. Appellant, however, brought a proceeding to test the constitutionality of the ordinance by way of application for writ of review and writ of prohibition. It may be deemed that the purpose was to attack the Board's decision as an act without or in excess of jurisdiction.

In *United States v. Sing Tuck,* 194 U. S. 161, 24 S. Ct. 621, 48 L. Ed. 917, where the question of administrative jurisdiction to act was first raised in a judicial proceeding for writ of habeas corpus, the Supreme Court reversed the Circuit Court of Appeal, stating that ". . . it is one of the necessities of the administration of justice that even fundamental questions should be determined in an orderly way." The substance of the court's holding was that the administrative tribunal first be given the opportunity of deciding its jurisdiction.

As the cases hold, this is a part of the doctrine of the exhaustion of administrative remedies, for it is not to be assumed that an administrative tribunal will act contrary to the law. Rather, it is presumed that it will regularly perform its official duty. (Code Civ. Proc., Sec. 1963.)

Where there is an opportunity to have questions determined by the agency, resort should not, in the first instance, be to the courts.

United States v. Sing Tuck, supra.

> ". . . it lies *within the power of the administrative agency* to determine in the first instance, and before judicial relief may be obtained, whether a

given controversy falls within the statutory grant of jurisdiction. (Citing.) And even where the statute sought to be applied and enforced by the administrative agency is challenged upon constitutional grounds, completion of the administrative remedy has been held a prerequisite to equitable relief. (Citing.)" (Emphasis supplied.)

United States v. Superior Court, 19 Cal. 2d 189, 195;

Woodward v. Broadway Fed. S. & L. Assn., 111 Cal. App. 2d 218.

B. Appellant Is Estopped to Assert Unconstitutionality.

Furthermore, it appears that appellant is estopped to assert the unconstitutionality of the ordinance in this proceeding. He applied for a police permit from the Board pursuant to the ordinance under attack. That ordinance provides various regulatory measures governing the conduct of public automobile parking lots. Appellant has had the benefit of a permit under the ordinance and also has had the benefit of a hearing on specified violations of that ordinance. His existence as a public parking lot operator has been under the aegis of the ordinance which he now attacks. If he can hold his permit under the ordinance, but strike down the provisions terminating, suspending, or otherwise regulating his conduct in its operation, then he may perpetually continue its operation notwithstanding any abuses which he may perpetrate. This court should, therefore, hold that appellant is estopped from challenging the provisions of the ordinance authorizing the Board to impose discipline for violating those provisions.

Stating the matter substantially as above, the United States Supreme Court has declared it to be reversible

error to hold a statute unconstitutional where the question was so raised.

Fahey v. Mallonee, 332 U. S. 245, 91 L. Ed. 2030.

C. Appellant Has Other Remedies Precluding His Right to the Writ.

Finally, even if appellant had properly raised the question of jurisdiction before the Board and that matter had been determined adversely to him, he would still have had an adequate remedy at law by an action for declaratory relief to test the constitutionality of the ordinance (15 Cal. Jur. 2d 208), in which case a preliminary injunction could be issued; or by an action to enjoin the ordinance on the ground that it was unconstitutional.

Bueneman v. Santa Barbara, 8 Cal. 2d 405;

French Art Cleaners v. State Board, etc., 91 Cal. App. 2d 890;

Downing v. California State Bd. of Pharmacy, 85 Cal. App. 2d 30.

D. Appellant Had a Fair Hearing and Subsequent Judicial Determination.

As set forth in the statement of facts, appellant had a complete and fair hearing before the hearing examiner and appellee Board. Appellant subsequently, in accordance with Section 1094.5 of the Code of Civil Procedure, made application for a writ of mandate.

E. The Constitutional Question.

Although not properly raised by the appellant in his petition for the writs and in the appeal from their denial, his assertions of unconstitutionality are determined by answering the question of whether or not a municipality

can, by ordinance, so regulate a commercial parking lot as to prohibit the operation of that business upon the public streets.

The City of Los Angeles may make and enforce within its limits such local and police regulations as are not in conflict with the general laws.

Cal. Const., Art. XI, Sec. 11;
Los Angeles City Charter, Sec. 2, Par. (6);
Los Angeles City Charter, Sec. 203.

This police power, within local limits and subject to the general laws, is as broad as that of the Legislature.

In re Maas, 219 Cal. 422;
In re Martinez, 22 Cal. 2d 259;
11 Cal. Jur. 2d 531.

In the latter case, regulation of taxicabs, though operated on public highways and subject to the traffic regulations of the Vehicle Code, was upheld as a reasonable exercise of its police power by the city.

In exercise of the police power, the state may prescribe regulations to promote public health, safety, morals and welfare, and legislate to increase industries, develop resources, and promote welfare and prosperity.

Pughe v. Lyle, 10 Fed. Supp. 245;
Graham v. Kingwell, 218 Cal. 658;
Ex parte Weisberg, 215 Cal. 624;
City of Pasadena v. Charleville, 215 Cal. 384.

Under its police power, the state in a proper case has the power, acting in the interests of the general welfare,

to regulate property and contract rights, and this includes the power to regulate the rights of free bargaining; and the fact that a statute limits the rights of free bargaining in other ways, does not of itself determine the validity of the enactment.

Max Factor & Co. v. Kunsman, 5 Cal. 2d 446.

A property owner's right to unlimited and uncontrolled disposition of property may properly be subordinated to public good under the police power.

Clemons v. City of Los Angeles, 36 Cal. 2d 95.

A municipality can regulate useful businesses which by their nature are affected with a public interest.

Munn v. Illinois (1876), 94 U. S. 113, 24 L. Ed. 77;

State Board v. Thrift-D-Lux Cleaners (1953), 40 Cal. 2d 436, 442-443.

The United States Supreme Court has declared that the term "affected with a public interest" means no more than "subject to the exercise of police power." ". . . there is no closed category of businesses affected with a public interest, . . ." and, "The phrase 'affected with a public interest' can, in the nature of things, mean no more than an industry, for adequate reason, is subject to control for the public good."

Nebbia v. New York, 291 U. S. 502, 536, 78 L. Ed. 940, 956.

In *Munn v. Illinois, supra,* the court held that when private property is devoted to public use, it is subject to public regulation.

Where a restriction of the use of highways is designed to promote public convenience and the interest of all, it cannot be disregarded by the attempted exercise of some civil right, which in other circumstances would be entitled to protection under the Constitution.

> *Cox v. New Hampshire* (1940), 312 U. S. 569, 85 L. Ed. 1049, 1052.

Streets and sidewalks of a city are designated primarily for *travel* and for the transportation of goods to and fro thereon.

> *People v. Amdur* (1954), 123 Cal. App. 2d 951, 959, and cases therein cited.

The *Amdur* case, *supra,* was reversed on a claim of unconstitutional application, but the ordinance itself was upheld.

Prohibiting the use of the public streets and sidewalks for the conduct of private business has been upheld many times as a reasonable exercise of the police power, against claims of interference with interstate commerce, property rights, contract rights and fundamental individual liberties.

> *California v. Thompson,* 313 U. S. 109, 85 L. Ed. 1219;
>
> *Pittsford v. City of Los Angeles,* 50 Cal. App. 2d 25;
>
> *In re Mares,* 75 Cal. App. 2d 798;
>
> *People v. Galena,* 24 Cal. App. 2d Supp. 770.

F. The Ordinance Is Based Upon a Reasonable Classification.

The determination of a class based upon size, number of units, volume or capacity has frequently been upheld:

Grigsby v. King, 202 Cal. 299, 306 (area employing 8 or more teachers to form a school district);

Gillum v. Johnson, 7 Cal. App. 2d 747 (classification based upon employer of 8 or more persons);

New York ex rel. Bryant v. Zimmerman, 278 U. S. 63 (classification based on membership in secret organization having over 20 members).

G. The Ordinance Does Not Impair the Obligation of Contract in Manner Prohibited by Article I, Section 10, United States Constitution.

Every species of private right or interest is subject to regulation under the police power, including those that are specifically underwritten by constitutional guaranty.

11 Cal. Jur. 2d 553;

Sutter etc. Co. v. R.R. Commission, 202 Cal. 179.

"The constitutional principle of inviolability of contracts is subject to the one great qualification that contractual rights, like all other forms of property, are held subject to the exercise of the police power."

11 Cal. Jur. 2d 677;

DeHaviland v. Warner Bros. Pictures, Inc., 67 Cal. App. 2d 225.

It is also noteworthy that the Supreme Court of the State of California denied appellant's petition for a hearing. As was declared in *Stembridge v. State of Georgia,* 343 U. S. 541, 72 S. Ct. 834, 96 L. Ed. 1130, where the highest court of the state delivers no opinion and it ap-

pears the judgment might have rested upon a non-federal ground, this court will not take jurisdiction to review the judgment.

Appellee urges, therefore, that the appellant presents no substantial question for the decision of this court; that the order sought to be appealed from should be affirmed and/or the appeal dismissed.

Respectfully submitted,

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By PHILIP E. GREY,
Attorneys for Appellee.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 453

WALTER M. BRIGGS, doing business as WALT'S AUTO PARKS AND GARAGES,

Appellant,

vs.

THE CITY OF LOS ANGELES, THE BOARD OF POLICE COMMISSIONERS OF THE CITY OF LOS ANGELES, STATE OF CALIFORNIA, MICHAEL KOHN, EMMETT McGAUGHEY, JOHN FERRARO, WILLIAM C. LUCITT and HERBERT A. GREENWOOD, Members of and constituting the Board of Police Commissioners of the City of Los Angeles,

Appellee.

WALTER M. BRIGGS, doing business as WALT'S AUTO PARKS AND GARAGES,

Appellant,

vs.

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Appellee.

PETITION FOR REHEARING.

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Appellee.

PETITION FOR REHEARING.

Comes now Walter M. Briggs, doing business as Walt's Auto Parks and Garages, appellant, and petitions for rehearing on the following grounds, to wit,

The court erred in holding in its memorandum decision of December 16th that the appeal should be dismissed for "want of a substantial federal question."

The questions raised in this appeal are substantial and entitle the petitioner to a hearing as a matter of right.

A ruling of a highest state court denying a stay of orders of a State Public Utilities Commission, issued pur-

suant to statutory authority and challenged as violating the federal constitution, amounts to a decision in favor of the validity of the statute upon which the orders were based and is reviewable by the United States Supreme Court upon appeal under Title 28, U. S. C., Section 1257(2), permitting the Supreme Court to review upon appeal judgments of the highest state courts where the question of the repugnancy of a state statute to the federal constitution is presented and the highest state court has decided in favor of the validity of the statute.

Atchison T. & S. F. R. Co. v. Public Utilities Comm., 346 U. S. 346, 98 L. Ed. 51.

Where appellants specifically challenge in the state court the validity of a state tax statute under the commerce clause, the issue of such validity is properly raised, even though none of the alleged operating incidents attacked coincide with the operating incidents found by state courts.

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, 98 L. Ed. 583.

The issues involved in this case affect every city in the country where parking lots are located. The city of Los Angeles has conferred upon the Police Commission the power to license and regulate parking lots. In this connection it has also provided that the licenses may be revoked under a number of conditions set out by the Police Commission. Among these conditions is that the owner or his employees in the parking lot may not drive their cars onto the street and back again, or remove any of the cars from the parking lot.

This ordinance which both affects the licensing powers of the city and its right to regulate the flow of automo-

biles to and from parking lots as conducted by the parking lot owners or their operators was challenged in the courts of California as being in violation of the equal protection and due process clauses to the Fourteenth Amendment to the Constitution of the United States. That challenge was denied.

Is the city ordinance of the city of Los Angeles arbitrary and capricious? Has it any reasonable relationship to the object sought to be gained? The challenge of due process and equal protection of the laws was raised in this case both under the due process and equal protections clauses of the Fourteenth Amendment to the Constitution of the United States and the District Court of California denied the challenge under the federal constitution (*Briggs v. City of Los Angeles*, 154 Cal. App. 2d 642) and rendered no opinion on the application for the writ of prohibition and writ of mandate and consolidated the two decisions. The Supreme Court of California denied a hearing on it. Thus the federal questions of substance on the constitutionality of the city ordinance and the acts of the Police Commission under it were specifically raised in the District Court of Appeal of the State of California and the challenge under the federal constitution was denied.

A municipal by-law or ordinance enacted by virtue of power for that purpose delegated by legislature of the state in a state law within the meaning of the federal constitution.

Atlantic Coast Line R. Co. v. Goldsboro, 232 U. S. 548, 58 L. Ed. 721;

Zucht v. King, 260 U. S. 174, 67 L. Ed. 194;

Jamison v. Texas, 318 U. S. 413, 87 L. Ed. 869.

Federal questions of substance are raised by the objection that a state statute declaring invalid any contractural limitation of the right to sue to a shorter period than two years violates the federal constitution.

Holmes Ins. Co. v. Dick, 281 U. S. 397, 74 L. Ed. 926.

Likewise a state statute which says that in contracting with the owner of an automobile to drive his automobile on and off of the street of a city and to move it as necessary in case of any need or any emergency, and that an ordinance which forbids the owner of a parking lot, or his employees, doing this violates the Fourteenth Amendment to the Constitution of the United States and Article I, Section 10, of the Constitution of the United States, and impairing the obligation of contract presents a substantial question for this court's review.

One denied a federal right by the highest court of a state may obtain a review by the Supreme Court of the United States *not merely by the grace of the court on certiorari, but as of right by appeal.*

Angel v. Bullington, 330 U. S. 183, 91 L. Ed. 832.

Since we have properly filed notice of appeal on federal questions duly raised and affecting parking lots all over the country, we respectfully pray for rehearing of the ground on which the appeal was dismissed.

As said by this court in *Angel v. Bullington*, 330 U. S. 183, 91 L. Ed. 832, at page 836:

> "Here, claims based on the United States Constitution were plainly and reasonably made in the North Carolina suit. The North Carolina Supreme Court met these claims. It met them by saying that the

North Carolina statute did not deal with substantive matters but merely with matters regulating local procedure. But whether the claims are based on a federal right or are merely of local concern is itself a federal question on which this Court, and not the Supreme Court of North Carolina, has the last say. That Court could not put a federal claim aside, as though it were not in litigation, by the talismanic word 'jurisdiction'. When an asserted federal right is denied, the sufficiency of the grounds of denial is for this Court to decide. Titus v. Wallick, 306 U. S. 282, 291, 83 L. ed. 653, 659, 59 S. Ct. 557. Bullington could have come here, not merely by the grace of this Court on certiorari, but on appeal, as did White in White v. Hart, 13 Wall (US) 646, 20 L. ed. 685, *supra*, to challenge, successfully, the right of Georgia to limit the jurisdiction of the Georgia courts; as did the East New York Savings Bank in the recent case of East New York Sav. Bank v. Hahn, 326 US 230, 90 L. ed. 34, 66 S. Ct. 69, 160 ALR 1279, to challenge, though unsuccessfully, the limitation which New York placed upon the jurisdiction of its courts. Cf. Kenney v. Supreme Lodge, L. O. 252 US 411, 416, 64 L. ed. 638, 641, 40 S. Ct. 371, 10 ALR 716."

Since it is a matter of right for the court to take jurisdiction by appeal (*Poulos v. New Hampshire*, 345 U. S. 395, 97 L. Ed. 1105), we respectfully pray for rehearing and the noting of probable jurisdiction in this case.

Respectfully submitted,

MORRIS LAVINE,

Attorney for Petitioner.

Certificate of Counsel.

Morris Lavine, Counsel for appellant hereby certifies that the foregoing petition is filed in good faith and not for delay and that it is based upon grounds created by the court's order since the filing of the original petition for certiorari and is restricted to those grounds.

MORRIS LAVINE,

Counsel for Petitioner.